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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

JAMES A. SCHLESINGER, Secretary of Defense, and BERNARD B. LYNN, Director of Defense Contract Audit Agency, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the Director of the Defense Contract Audit Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

Neither the court of appeals nor the district court rendered any opinion.[1]

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[1] This petition for this writ of certiorari seeks review of the court of appeals' denial of a writ of prohibition and/or

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1975 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act and Rule 53(b) of the Federal Rules of Civil Procedure preclude the district court from referring this Freedom of Information Act ("FOIA") case and all other complex FOIA cases to special masters for recommended decisions.

STATUTE AND RULE INVOLVED

Sections 2(b)(2) and (5) of the Freedom of Information Act of 1967, 81 Stat. 54, 5 U.S.C. 552 (b)(2) and (5), provide in pertinent part:

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mandamus in *Schlesinger* v. *United States District Court for the District of Columbia*, No. 75-1013 (C.A.D.C.) (App. A, *infra*, 1a). On January 21, 1975, the court of appeals granted petitioners' motion for a stay of the district court's January 7, 1975, order appointing a special master until February 21, 1975 (App. A, *infra*, 3a). On February 24, 1975, the court of appeals extended the stay until March 23, 1975 (App. A, *infra*, 4a).

Also included in App. A, *infra*, is the court of appeals' dismissal of petitioners' appeal in *Cuneo* v. *Schlesinger*, No. 75-1005 (C.A.D.C.) (App. A, *infra*, 2a), which raised the same substantive issues presented in the petition for a writ of mandamus.

(b) This section does not apply to matters that are—

* * * * *

(2) related solely to the internal personnel rules and practices of an agency;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Rule 53(b) of the Federal Rules of Civil Procedure provides:

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

STATEMENT

This petition for a writ of certiorari seeks review of the court of appeals' denial of a petition for a writ of prohibition and/or mandamus which sought to prevent the district court from referring this case to a special master. The prior proceedings which culminated in the district court's action and the court of appeals' denial of review are set forth below.

Plaintiffs' attorneys, whose practice consists substantially of advising and conducting litigation on behalf of firms that contract with the United States, brought suit under the Freedom of Information Act of 1967, 5 U.S.C. 552, *et seq.*, seeking access to the Defense Contract Audit Manual (the "Manual") compiled by the Defense Contract Audit Agency to assist its auditors in verifying costs incurred by private contractors in performing contracts for the armed services. The district court, after examining the Manual *in camera*, held the Manual exempt from disclosure under 5 U.S.C. 552(b)(2) and (5), and granted the government's motion for summary judgment. *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C.).

The district court found that "[a]udits [of government contracts] must be conducted on a selective basis" (338 F. Supp. at 505), and that the Manual could be compared to a "play-book" that cannot be released to the opposing team (*id.* at 506). The court concluded that disclosure of the Manual would enable defense contractors to avoid the selective auditing procedures contained in the Manual, thereby permitting cost claims "that might well result in bilking the Government, and hence the taxpayers, of hundreds of millions of dollars on Defense Contracts." *Cuneo* v. *Laird*, *supra*, 338 F. Supp. at 506.

The court of appeals reversed, holding that the record did not contain sufficient information to permit review of the Freedom of Information Act claims. *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (C.A.D.C.). The case was remanded to the district court for further

proceedings with particular directions to determine whether the Manual constituted "secret law" (*id.* at 1089). The court of appeals ordered the government, on remand, to index the Manual, to correlate the portions of the Manual claimed to be exempt from disclosure with the appropriate sections of the Freedom of Information Act, and to set forth reasons justifying the withholding of the information.

The court of appeals commented in dictum that the district court, in its discretion, could "appoint a special master to examine the manual, the government's justification, and the indexing" (*Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1092).[2]

On remand the government complied with the court of appeals' instructions by submitting a detailed page-by-page index, a statement relying on exemptions 2 and 5 of the Freedom of Information Act of 1967, 5 U.S.C. 552(b)(2) and (5), and affidavits of the immediate past and present Directors of the Defense Contract Audit Agency. The Manual was again made available to the district court for *in camera* inspection.

On November 20, 1974, the district court, over the government's objections, ordered the appointment of

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[2] The court of appeals made a similar comment in its opinion in *Vaughn* v. *Rosen*, 484 F.2d 820, 828 (C.A.D.C.). The government filed a joint petition for a writ of certiorari in both *Cuneo* v. *Schlesinger*, *supra*, and *Vaughn* v. *Rosen*, *supra*, which presented, *inter alia*, the question of the appointment of a special master. The petition for a writ of certiorari was denied. *Rosen* v. *Vaughn*, 415 U.S. 977. See note 6, *infra*.

a special master (App. B, *infra*, 5a). The court observed (App. C, *infra*, 10a) that Freedom of Information Act cases involve "complex matters before Judges that they have no competency whatever to decide," and further stated:

> If you are talking about setting precedent in future cases, I must say that this Court has been so overburdened with this Freedom of Information Act, that in the future in almost any complex case, I am going to appoint a special master, so it is going to be a precedent, that is for sure. [App. C, *infra*, 15a.]

On January 7, 1975, the court appointed Daniel M. Arons, Vice-Chairman of the Armed Services Board of Contract Appeals, as special master and directed him to review the entire Manual *in camera* and to make findings and conclusions concerning the applicability of exemptions claimed by the government (App. B, *infra*, 6a-8a).

Petitioners filed a motion for a writ of prohibition and/or mandamus and a notice of appeal from the district court's November 20, 1974 order, seeking to prevent the appointment of, and the reference to, a special master. The court of appeals without opinion denied the writ (App. A, *infra*, 1a) and dismissed the appeal (App. A, *infra*, 2a).[3]

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[3] The special master has not yet reviewed the Manual or proceeded with other duties as required by the January 7, 1975, order of the district court (App. B, *infra*, 6a-8a). The court of appeals granted petitioners' motion for a stay until February 21, 1975, of the district court's orders appointing a special master (App. A, *infra*, 3a). On February 24, 1975,

REASONS FOR GRANTING THE WRIT

This case presents an issue of general importance to judicial administration and of particular importance to Freedom of Information Act litigation. The district court's appointment of a special master in this case—and its stated intention to appoint special masters in all future complex Freedom of Information Act cases—is yet another illustration of an increasing tendency of federal district courts to refer categories of important cases to United States magistrates or special masters.[4]

The district court's action in this case, and its stated intention concerning future cases, is contrary to the express terms of Rule 53(b) of the Federal Rules of Civil Procedure as construed by this Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249. The district court's action is also inconsistent with the policies of the Freedom of Information Act as interpreted by this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73.

1. Rule 53(b) of the Federal Rules of Civil Procedure states that a reference to a special master "shall be the exception and not the rule", and shall

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the court of appeals extended the stay until March 23, 1975 (App. A, *infra*, 4a).

[4] See, *e.g.*, *Wingo* v. *Wedding*, No. 73-846, decided June 26, 1974 (reference of habeas corpus applications to magistrates); *Weber* v. *Secretary of Health, Education, and Welfare*, 503 F.2d 1049 (C.A. 9), petition for a writ of certiorari pending, No. 74-850 (reference of social security cases to magistrates). See also *TPO, Inc.* v. *McMillen*, 460 F.2d 348 (C.A. 7).

be made "only upon a showing that some exceptional condition requires it." This Court's decision in *LaBuy* v. *Howes Leather Co.*, *supra*, makes clear that neither docket congestion nor the complexity of litigation—the only grounds cited by the district court in this case—constitutes an exceptional condition that requires a reference to a special master.

Docket congestion is a particularly inappropriate ground for reference to a special master because it would, particularly in light of the volume of Freedom of Information Act cases filed in the District of Columbia,[5] make * * * references the rule rather than the exception" (*LaBuy*, *supra*, 352 U.S. at 259). Indeed, the district court has indicated that precisely that result will occur in Freedom of Information Act cases in the District of Columbia (App. C, *infra*, 5a).

Moreover, the district court's reliance on docket congestion as a justification for the reference in this case rests, we submit, on the erroneous premise that the litigation will be expedited by the reference. The district court has previously reviewed the Manual and now has before it a detailed index of the Manual prepared by the government. Reference will not expedite the decision in this case; rather, as this Court held in *LaBuy*, *supra*, 352 U.S. at 256, the district court can "dispose of the litigation with greater dispatch and less effort than anyone else."

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[5] More than half of all Freedom of Information Act cases handled by the Department of Justice are brought in the District of Columbia. See our reply memorandum in *Butterfield* v. *Robertson*, No. 74-450, p. 3 n. 2.

The complexity of legal issues presented does not warrant reference to a special master; indeed, the presence of complex questions of law is "an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work" (*LaBuy, supra*, 352 U.S. at 259). The ultimate issue in this case—unlike essentially factual questions such as those involved in an accounting for damages which might be appropriate for reference to a special master (*ibid.*)—is whether the Manual constitutes "secret law". That issue is particularly appropriate for resolution by a district judge.[6]

2. The reference in this case, and the district court's intention to refer all future Freedom of Information Act cases to special masters, may involve substantial intrusions on interests protected by the Freedom of Information Act. If, as we contend and as the district court originally held, the Manual is exempt from disclosure under Exemption 5 of the Act (5 U.S.C. 552(b)(5)), release of the Manual "would be 'injurious to the consultative functions of government * * *.'" *Environmental Protection*

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[6] At the time of filing of the petition denied in *Rosen* v. *Vaughn* (note 2, *supra*), a special master had not been appointed in either *Cuneo* or *Rosen*. A special master has now been appointed in this case, and but for the court of appeals' stays, would be exercising judicial functions. The issue of reference to a special master is therefore ripe for consideration.

Agency v. *Mink*, *supra*, 410 U.S. at 87. In light of the governmental interest against disclosure, even *in camera* inspections by district courts should not be made routinely or automatically (*id.* at 93). Yet the district court has indicated that inspections by special masters will be "automatic".

To be sure, the degree of invasion of the government's interest in maintaining the confidentiality of material may depend on the identity of the individual appointed as special master. In the district court, respondents asserted that the special master appointed here is entitled to access to the Manual in his capacity as a member of the Armed Services Board of Contract Appeals. The record does not contain any information concerning this point,[7] and, in our view, the question of the special master's right of access to the Manual is inextricably related to the merits of this litigation.

Throughout this litigation we have contended that the Manual does not constitute "secret law"; that it is an intra-agency memorandum not to be cited by government counsel, and, of course, not to be used as a basis for decisions, in government contract litigation. If, as we believe, our submission is correct, the Board of Contract Appeals would not be entitled to access to the Manual, and indeed, if it were furnished to the Board but not to a private litigant, substantial due process issues would arise.[8]

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[7] We are informed by the Defense Contract Audit Agency that Mr. Arons has not in fact seen the Manual.

[8] Moreover, if the district court ultimately upholds our position that the Manual does not constitute "secret law", dis-

Apart from this case, the district court's stated intention to refer all future complex Freedom of Information Act cases to a special master presents substantial questions. Special masters are frequently appointed from the practicing bar and such persons, although they may not be subject to conflicts of interest at the time of their appointment, may thereafter acquire obligations inconsistent with their service as a special master. Even if, as in this case, a special master is appointed from a government agency, such persons may be subjected to conflicting pressures that cast doubt on the objectivity of their recommendations.

3. The court of appeals erred in refusing to issue a writ of mandamus and/or prohibition to prevent the reference in this case. The reference was "so palpably improper so as to place it beyond the scope of the rule invoked" (*LaBuy, supra*, 352 U.S. at 256) and mandamus should have issued. See also *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701; *McCullough* v. *Cosgrave*, 309 U.S. 634.

Mandamus was particularly appropriate because the reference presented an issue of first impression and review is necessary to settle "new and important problems" in the administration of the Freedom of Information Act. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111. An appeal after a final decision on the merits will not protect the Freedom of Informa-

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closure to Mr. Arons may operate to disqualify him from participating in Board appeals involving audit questions.

tion Act interests at stake and the Rule 53 issue will be moot if review is postponed.[9]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

WILLIAM L. PATTON,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
LARRY R. O'NEAL,
Attorneys.

MARCH 1975.

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[9] *LaBuy* involved a pattern of references to special masters. While such a pattern has not yet emerged in the District of Columbia, the court of appeals has endorsed, albeit in dictum, the use of special masters in Freedom of Information Act cases (see, *e.g.*, *Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1092, and *Vaughn* v. *Rosen*, *supra*, 489 F.2d at 828), and the district court has stated that it intends to refer all complex Freedom of Information Act cases to special masters (App. C, *infra*, 15a). Unless it is resolved in this case, references to special masters will be a recurring issue in Freedom of Information Act litigation, and the interests of judicial economy require that it be resolved now.

APPENDIX A

Page	Document
1a	In *Schlesinger* v. *United States District Court for the District of Columbia,* CADC's denial of the writ of prohibition and/or mandamus and denial of immediate temporary stay pending CADC's action on the writ. Order of January 6, 1975.
2a	In *Cuneo* v. *Schlesinger,* No. 75-1005 (C.A.D.C.), CADC's dismissal of our appeal in this action. Order of January 10, 1975.
3a	In *Schlesinger* v. *United States District Court for the District of Columbia,* No. 75-1013, CADC's granting of a stay pending application for certiorari—until February 21, 1975—order of January 21, 1975.
4a	In *Schlesinger* v. *United States District Court for the District of Columbia,* No. 75-1013, CADC's extension of stay pending application for certiorari until March 23, 1975—order of February 24, 1975.

APPENDIX B

5a	United States District Court for the District of Columbia, order of November 20, 1974 in *Cuneo* v. *Schlesinger* stating that a special master will be appointed.
6a-8a	United States District Court for the District of Columbia, order of January 9, 1974, appointing a special master with specific instructions.

APPENDIX C

9a	In *Cuneo* v. *Schlesinger,* first page of hearing of November 14, 1974, before Judge Hart.
10a-13a	Portions of the November 14, 1974 hearing before Judge Hart.
14a	In *Cuneo* v. *Schlesinger,* first page of hearing of December 5, 1974, before Judge Hart.
15a-17a	Portions of the December 5, 1974, hearing before Judge Hart.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Civil 1826-67

No. 75-1013

[Filed Jan. 6, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

JAMES A. SCHLESINGER, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, RESPONDENT

Before: TAMM and ROBB, *Circuit Judges*

ORDER

On consideration of the Petition for a Writ of Prohibition and/or Mandamus and of Petitioners' Motion for Immediate Temporary Stay pending this Court's action on the Petition for a Writ of Prohibition and/or Mandamus, it is

ORDERED by the Court that petitioners' motion for immediate temporary stay is denied, and, it is

FURTHER ORDERED by the Court that petitioners' petition for Writ of Prohibition and/or Mandamus is denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Civil 1826-67

No. 75-1005

GILBERT A. CUNEO, ET AL.

v.

JAMES A. SCHLESINGER, Secretary of Defense, ET AL.,
APPELLANTS

Before: TAMM and ROBB, *Circuit Judges*

ORDER

On consideration of appellees' motion to dismiss, it is

ORDERED by the Court that the aforesaid motion is granted and this appeal is dismissed.

The Clerk is directed to issue and transmit the mandate of this Court to the Clerk of the District Court forthwith.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 75-1013

JAMES A. SCHLESINGER, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, RESPONDENT

Before: ROBB, *Circuit Judge*

ORDER

Petitioners have moved for a writ pursuant to 28 U.S.C. § 1651 pending application for a writ of certiorari in the Supreme Court of the United States. It appearing to this Court that the relief sought in the petition for certiorari may be rendered moot if the Defense Contract Audit Manual is disclosed to the Special Master, it is

ORDERED by the Court that the District Court's order directing disclosure in *Cuneo* v. *Schlesinger*, No. 1826-67 (D.D.C. 1974) is stayed until February 21, 1975.

The Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court forthwith.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

1826-67

No. 75-1013

[Filed Feb. 24, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

JAMES A. SCHLESINGER, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, RESPONDENT

Before: ROBB, *Circuit Judge*

ORDER

On consideration of petitioners' motion to extend this Court's stay of January 21, 1975, it is

ORDERED that the aforesaid motion is granted and the District Court's order directing disclosure in *Cuneo* v. *Schlesinger*, No. 1826-67 (D.D.C. 1974) is stayed to and including March 23, 1975.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFFS

v.

JAMES A. SCHLESINGER, ET AL., DEFENDANTS

ORDER

Upon consideration of the plaintiffs' Motion for the Appointment of a Special Master and the defendants' opposition thereto, and it appearing to the Court that the appointment of a Special Master in this case has been expressly authorized by the Court of Appeals, and that a Special Master will expedite final decision in this case, it is, therefore, by the Court this 20th day of November, 1974, ORDERED as follows:

(1) A Special Master will be appointed with instructions to review the entire case and report to the Court recommended findings and conclusions; and

(2) Counsel for plaintiffs and defendants may submit a nominee to act as Special Master, or if counsel cannot agree, they may each submit two names to the Court for the Court's consideration.

/s/ George L. Hart
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFFS

v.

JAMES A. SCHLESINGER, ET AL., DEFENDANTS

ORDER

Upon consideration of plaintiffs' Motion for the Appointment of a Special Master, and it appearing to the Court that the appointment of a Special Master in this case has been expressly authorized by the Court of Appeals, and that a Special Master will expedite final decision in this case, it is, therefor, by the Court this 7th day of January, 1975, ORDERED as follows:

(1) Daniel M. Arons, Vice-Chairman of the Armed Services Board of Contract Appeals is appointed as the Special Master in this case;

(2) The Special Master shall review the record before this Court and the Court of Appeals;

(3) The Special Master shall review all of the portions of the Defense Contract Audit Manual and all amendments thereto, access to which has been refused by the defendant, *in camera*, and shall make with respect thereto findings and conclusions on the following subjects:

a. Those portions of the Manual which contain explanations, interpretations, refinements and instructions which amplify, implement, vary from or are significantly related to provisions of the Armed Services Procurement Regulation, including section 15 thereof and specifically relating furthermore to the allowance or disallowance of costs under government contracts and to the approval or disapproval of accounting systems and practices of government contractors;

b. The extent to which those portions of the Manual reviewed *in camera* are substantially similar in the directions and instructions for auditing and approval or disapproval of audited material to the Internal Revenue Audit Manual, which is before this Court and which was required to be disclosed by the Sixth Circuit Court of Appeals in *A. Kenneth Hawkes* v. *Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972);

c. Those portions of the Manual reviewed *in camera* which relate solely to internal personnel rules and practices of the Defense Contract Audit Agency;

d. Those portions of the Manual reviewed *in camera* which for any reason affect members of the public;

e. Those portions of the Manual reviewed *in camera* which have been ordered disclosed in any litigation (including administrative litigation) with the defendants;

(4) The Special Master shall conduct all proceedings which are necessary to determine the nature and

extent of disclosures by the defendant outside the federal government of those portions of the Manual, access to which has been refused to plaintiffs; and, the Special Master shall determine the extent to which such portions of the Manual have been published either verbatim or by substantial disclosure of their subject matter.

With respect to the proceedings so conducted, the Special Master shall make all necessary findings and recommended conclusions;

(5) The Special Master shall file with this Court his findings and conclusions no later than March 31, 1975;

(6) All costs incurred in connection with the functions of the Special Master shall be borne by plaintiffs;

(7) The Clerk of this Court is directed to promptly forward the entire file in this case to the Special Master.

/s/ George L. Hart
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was hand delivered to Jeffrey Axelrad, Esquire, Department of Justice, Washington, D. C. 20530, this 20th day of December, 1974.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

APPENDIX C

[1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFF

vs.

JAMES A. SCHLESINGER, ET AL., DEFENDANT

Washington, D. C.
Thursday, November 14, 1974

The above-styled cause came on for hearing before THE HONORABLE GEORGE L. HART, JR., Chief Judge, United States District Court, in chambers, at 10:05 o'clock a.m. for status call.

APPEARANCES:

On behalf of the Plaintiff:

ROBERT L. ACKERLY, Esq.

On behalf of the Government:

JEFFREY AXELRAD, Esq.
Department of Justice.

* * * * *

E. ALFRED KAUFMAN
Official Reporter

* * * *

[6] secret law should be disclosed, we agree wholeheartedly with that concept.

We do not think that any portion of the Manual is secret law, and we think that we presented evidence to the Court, in keeping with the Court of Appeals ruling, and since then a detailed index, a further statement of pertinent facts with which plaintiffs have not differed on the question of how the contract dispute procedure operates, and we think that this shows that there is no secret law in the Manual.

Now, Your Honor had the opportunity of examining the Manual once and, of course, if Your Honor ordered, we would provide it again. We would vigorously oppose a Special Master for reasons different from those which Mr. Ackerly has expressed.

THE COURT: Why would you oppose it?

MR. AXELRAD: We oppose it, Your Honor, because we believe it is the function of a District Judge, if anyone, to examine the document which the Government claims should not be released, and that only an Article III Judge is the appropriate person to decide any such question.

THE COURT: Look, in the Freedom of Information law there is complex matters before Judges that they have no competency whatever to decide.

The Amchitka case involved all sorts of atomic secret information, and what not, that to me was just a lot of [7] Greek.

The same thing, I think, is true to a lesser extent in this type of case. You are talking about accounting practices, and that type of thing, which I do not

know anything on earth about, I do not know anything about.

The Court of Appeals has suggested that in that type of case we can get an expert in, and I think it would fair to all parties to get an expert in. If you all cannot get together on it—

MR. ACKERLY: I would be willing to pay for it, but may I make one minor point. I don't want to take up too much of the Court's time.

THE COURT: I have all day.

MR. ACKERLY: There are other Government lawyers besides the Department of Justice. These people represent the Navy, the Army, the Air Force. They use the Manual against us in these cases all the time.

I put in the record for Your Honor an opinion which is published where the Government lawyer argued on an allowance of a cost—argued for disallowance of the cost based on the Manual. He quoted the Manual. The Board Member quoted that section of the Manual in his opinion, and said in his opinion it wasn't applicable.

We are getting the Manual—and I have given Your Honor some cases—we are getting the Manual from the Armed

* * * *

[12] knowledge of both, and I think also we should have a lawyer who doesn't practice—

MR. ACKERLY: In the Government contract field—I agree.

THE COURT: So this would give him an undue advantage.

MR. ACKERLY: I agree.

MR. AXELRAD: Your Honor, the opposition aside, it might be possible for us to agree on an individual satisfying the criteria Your Honor has specified, but we would urge that the position which Mr. Ackerly has suggested be filed, be filed so that we may have a formal chance to oppose it, and perhaps at that stage would request Your Honor to certify that for an interlocutory appeal, because we feel very strongly about that.

THE COURT: The first part I will do; the second part I won't, because I think the Court of Appeals already decided. And I have discussed this matter several times with Judge Wilkey and members of the Court of Appeals—not in this case, but other cases. This is a perpetual problem; it is a perpetual problem.

And I go back to Amchitka. In Amchitka I had to call back experts and sit at that table and read paper upon paper and then ask question after question what the devil does this mean, what does that mean?

I have never in my life practiced administrative [13] law. It is as much of a puzzle to me as atomic energy, and I frankly don't feel qualified to determine what is secret law and what isn't, I just simply don't.

MR. AXELRAD: Well, Your Honor, with all due respect, I think that you are qualified.

THE COURT: There are judges who think they are God and know everything, but I am not one of them.

MR. AXELRAD: Your Honor, there is a Supreme Court decision, La Bue [*sic*] versus Howe Leather Company, involving an anti-trust proceeding which the Court assigned to a Special Master because of the complexity of the issues in what was a complex anti-trust case.

The Supreme Court in that case, as I recall, held that there was such error, such clear error in the appointment of the Special Master that it required mandamus, as I recall, to require the District Judge in that case to hear it. I am not suggesting that would be followed here.

THE COURT: Well, I am always amenable to mandamus from the Supreme Court.

MR. AXELRAD: I say that only as a recital of the facts in that case. But, Your Honor, here we have a Manual which while fairly voluminous, is not a huge bundle of thousands of documents.

THE COURT: It is either three or four volumes, so think [indicating], as I remember it, or is it more?

[1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFF

vs.

JAMES A. SCHLESINGER, ET AL., DEFENDANT

Washington, D. C.
Thursday, December 5, 1974

The above-styled cause came on for further hearing before THE HONORABLE GEORGE L. HART, JR., Chief Judge, United States District Court, at 10:00 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff:

ROBERT L. ACKERLY, Esq.

On behalf of the Government:

JEFFREY AXELRAD, Attorney
Department of Justice.

* * * * *

E. ALFRED KAUFMAN
Official Reporter

* * * *

[7] and understandable basis for decision, because we believe we have shown as a per se matter that nothing in the Manual can constitute secret law for

the simple reason that the final decision is made by a contracting officer on the basis of other matters which we have brought before the Court.

Now, I can't very well argue our whole case on this matter this morning, and won't attempt to. Plaintiff's counsel has contended our arguments are not legally sufficient, but certainly if you were to decide whether our showing in the papers which we have filed pursuant to Your Honor's scheduled proceedings are sufficient to entitle us to judgment, that might well dispose of the case. We think it would, without examining paragraph by paragraph the matter, especially since we have filed a page by page index.

THE COURT: You know what astounds me in this matter? I would think that the opposite positions would have been taken here. I would have thought that you all would have welcomed an expert in the field, and the plaintiff might have opposed it. And I have a very difficult time understanding why you oppose an expert in the field, it seems to me so highly desirable.

MR. AXELRAD: It is the principle of the matter, Your Honor.

THE COURT: If you are talking about setting precedent [8] in future cases, I may say that this Court has been so overburdened with this Freedom of Information Act, that in the future in almost any complex case, I am going to appoint a special master, so it is going to be a precedent, that is for sure.

MR. AXELRAD: Well, Your Honor, we are concerned about that. It is not just in Information Act cases, although that is our prime concern, we have specific concerns in that matter, and I am distressed to hear—although I appreciate Your Honor's candor —I am distressed to hear Your Honor is contemplating that course.

For one thing, Your Honor, we do not think that the question of what constitutes secret law requires the type of expertise, we think it's the type of question which judges traditionally handle.

THE COURT: We traditionally handle a lot of things we don't know anything about.

MR. AXELRAD: We think that is the function of judges. It's a neutral concept for which we are contending, we are simply contending that judges are responsible under the Constitution to—

THE COURT: No question about it, the final responsibility is mine, but I also have a responsibility to get help if I need it.

MR. AXELRAD: Your Honor, the question is, where lies

* * * *

[17] certify it, and I think you would be wasting your time.

MR. AXELRAD: Should we seek appellate relief, could Your Honor stay the proceedings before the special master while appellate proceedings are pending?

THE COURT: No, because this is a '67 case, and I would like very much to get rid of the thing. So there we are.

[Hearing concluded.]

* * * *

CERTIFICATE OF REPORTER

I hereby certify that the foregoing 17 pages constitute the official transcript of proceedings had in the above-styled cause.

/s/ E. A. Kaufman
Official Reporter

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